91-798 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 18, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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United States Court of Appeals
for the District of Columbia Circuit

No. 90-1136 September Term, 1990

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and Consolidated Cases

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Ruth B. Ginsburg and Henderson did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-1136, 90-1215 and 90-1237

Decided Aug. 20, 1991.

Rehearing and Rehearing En Banc Denied
Aug. 20, 1991.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MAXUS EXPLORATION COMPANY, NORFOLK ENERGY, INC., ARCO OIL AND GAS COMPANY, EXXON CORPORATION, KANEB EXPLORATION, INC., OKMAR OIL COMPANY, SHELL WESTERN E & P, INC., SHENANDOAH OIL CORPORATION, TEXAS INTERNATIONAL PETROLEUM COMPANY AND PHOENIX RESOURCES COMPANY, KAISER-FRANCIS OIL COMPANY AND LEBEN OIL CORPORATION, BASS ENTERPRISES PRODUCTION COMPANY,
Intervenors.

STEPHEN F. WILLIAMS, *Circuit Judge*:

Petitioners seek rehearing [1] on the theory that the court's opinion violates the principle of *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947), that courts may judge the propriety of an administrative agency's act "solely by the grounds invoked by the agency." Specifically, the argument is that FERC purported to decide the application of area rate clauses to NGPA ceilings on the basis of the actual, historical intent of the parties at the time of contracting, whereas the court upheld the Commission's decision on the basis of a hypothesized intent as to what parties would have intended had they in fact contemplated the onset of congressionally specified ceilings.

Supporting the petitioners' view are statements of FERC appearing to focus on historic intent. For example, one reference highlighted by petitioners is the order of the Commission setting the case for hearing and identifying the controlling issue as whether Northern and the producers "*intended* [area rate clauses] to trigger payment of NGPA ceiling prices when the contracts at issue were entered into." 43 FERC ¶ 63,015 at 65,147 (1988) (emphasis in original).

The trouble with these citations is that taken literally they make the Commission's inquiry a farce. It is inconceivable that contracting parties in (say) 1965 intended the clauses "to trigger payment of NGPA ceiling prices", as no one at that era had suggested adoption of anything called "NGPA" or "Natural Gas Policy Act". Even if we expand the reference to avoid that

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[1] They have also suggested rehearing *en banc*. The full court's disposition of the suggestion is covered in a separate order issued concurrently.

absurdity, and read it as encompassing national legislation setting rates in lieu of the Federal Power Commission's area rates, the working presumption of Order No. 23 -- essentially that the parties commonly formed an "intent" to cover such congressional rates -- would have been overwhelmingly contrary to fact: only a relatively small portion of actors in the natural gas market are likely in the early days to have contemplated the critical legislative development (and thus been able to form an intent). Thus, even read in this moderately literalist way, the Commission's mandate to the administrative law judge would have been to embark on a wild goose chase. Moreover, it is clear from the writings of the contract scholars discussed in the court's opinion that courts themselves commonly use the language of historic intent in situations that are really ones of hypothesized or reconstructed intent. See, e.g., 6 Samuel Williston, A Treatise on the Law of Contracts § 825 at 52-60 (3d ed. 1962). It is hardly a violation of *Chenery* for a reviewing court to infer that the agency's usage was, similarly, a kind of shorthand. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed. 2d 447 (1974).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-1136, 90-1215 and 90-1237

Argued March 14, 1991.

Decided May 24, 1991.

Rehearing and Rehearing En Banc
Denied August 20, 1991.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

Maxus Exploration Company, Norfolk Energy, Inc., Arco Oil and Gas Company, Exxon Corporation, Kaneb Exploration, Inc., Okmar Oil Company, Shell Western E & P, Inc., Shenandoah Oil Corporation, Texas International Petroleum Company and Phoenix Resources Company, Kaiser-Francis Oil Company and Leben Oil Corporation, Bass Enterprises Production Company,

Intervenors,

Northern Natural Gas Co., a division of Enron Corp.

PEOPLES NATURAL GAS COMPANY,
DIVISION OF UNTILICORP UNITED, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division of Santa Fe International Corporation, Santa Fe-Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Contenental Energy, John H. Hendrix, Okmar Oil Company, Neleh Gas and Oil Company, Damson Oil Corporation, Montana Consumers Counsel, Public Utilities Commission Of South Dakota and Montana Public Utilities Commission, Intervenors, Northern Natural Gas Co., a division of Enron Corp.

MINNESOTA PUBLIC UTILITIES COMMISSION,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division Of Santa Fe International Corporation, Santa Fe-

Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Continental Energy, Wayman W. Buchanan, Kaneb Exploration, Inc., Champlin Exploration, Inc., Shell Western E & P, Inc., Exxon Corporation, Norfolk Energy, Inc., Arco Oil and Gas Company, Division Of Atlantic Richfield Company,

Intervenors,

Northern Natural Gas Co., a division of Enron Corp.

Petitions for Review of an Order of the F.E.R.C.

Daniel Guttman, with whom *Frances E. Francis* and *Daniel I. Davidson*, for South Dakota Public Utilities Commission, *John M. Cutler, Jr.*, for Peoples Natural Gas Company and *Jon Kingstad* for Minnesota Public Utilities Commission were on the joint brief, for petitioners in Nos. 90-1136, 90-1215 and 90-1237. *Jocelyn F. Olson* for Minnesota Public Utilities Commission also entered an appearance for petitioner.

Timm L. Abendroth, Attorney, Federal Energy Regulatory Commission, with whom *William S. Scherman*, General Counsel and *Joseph S. Davies*, Deputy Solicitor, Federal Energy Regulatory Commission were on the brief, for respondent in all cases. *Jerome M. Feit*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Stephen L. Teichler, with whom *Kent K. Carter*, *C. Roger Hoffman* and *Douglas W. Rasch* for Exxon Corporation and the Estate of E.G. Rodman, *Charles H. Shoneman* and *Randall S. Rich* for Graham-Michaelis Corporation, Kaiser-Francis Oil Company, Petroleum, Inc., Phoenix

Resources Company, Shenandoah Oil Company, Texas International Petroleum Company, Trees Oil Company, *Robert F. White*, *Robert L. Williams*, *Lester Wilkonson*, *Philip R. Ehrenkranz* and *Paul F. Forshay* for John H. Hendrix Corporation, Neleh Gas and Oil Corporation, et al. and Okmar Oil Corporation, *James B. Wilcox* and *Richard T. Saas* for Kaneb Exploration, Inc., and Leben Oil Corporation, *Johnny J. Akins*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Kerr-McGee Corporation, *Jennifer A. Cates* for Lear Petroleum Corporation and Tex/Con Oil and Gas Company, *Robert W. Clark* and *Gail S. Gilman* for Mapco, Inc., Mapco Oil and Gas Company and Werner Oil, Inc., *Robert C. Murray*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Marathon Oil Company, *R. Brent Harshman* and *Nancy J. Shancke* for Maxus Exploration Company, *Gary M. Prescott* and *Nancy J. Shancke* for Mesa Operating Limited Partnership, *Marge O'Connor*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Mobil Natural Gas, Inc., Mobil Producing Texas and New Mexico, Inc., Mobil Oil Exploration and Producing Southeast, Inc., *Albert S. Tabor* and *Catherine O'Harra* for Norfolk Energy, Inc., *Michael L. Pate* for Oxy USA Inc., *Robert Lemon* for Perryton Operating Company, *Nancy J. Shancke* for Philcon Development, Phillips Petroleum Company, Phillips 66 Natural Gas Company and Sidwell Oil and Gas, Inc., *William H. Boyles*, *Robert W. Clark* and *Gail S. Gilman* for Santa Fe-Andover Oil Company, Santa Fe Minerals, Inc., and Santa Fe Braun, Inc., *Kathleen T. Puckett* for Shell Western E&P Company, *Philip C. Wrangle* and *Nancy J.Shancke* for Sonat Exploration Company, *John P. Beall* and *Nancy J. Shancke* for Texaco, Inc., and Texaco Producing, Inc., *Kerry R. Brittain* and *Nancy J. Shancke* for Union Pacific Resources Company were on the joint brief of Producer Intervenors in all cases. *James L. Trump* for John H. Hendrix Corporation, et al. and Okmar Oil Company, *Charles J. McClees, Jr.* and *James A. Ruoff* for Shell Western E&P, Inc.,

James L. Trump for Neleh Gas and Oil Corporation also entered appearances for Producer Intervenors.

Deborah A. MacDonald, Bill H. Kochenmeister, George J. Meiburger, Frank X. Kelly and *Steve Stojic* were on the brief for intervenor Northern Natural Gas Company, Division of Evron Corporation in all cases.

John M. Cutler, Jr. entered an appearance for petitioner Peoples Natural Gas Company in No. 90-1215.

Kevin M. Sweeney, Frank H. Markle and *Charles F. Hosmer* entered appearances for Arco Oil and Gas Company.

James T. McMancis, Joseph O. Fryzell and *Steven K. Schroeder* entered appearances for intervenor Northwest Pipeline Corporation.

Robert H. Benna, David D. Withnell, Terrance J. Collins and *Margaret L. Bollinger* entered appearances for intervenor Tennessee Gas Pipeline Company.

Michael E. Small entered an appearance for intervenor Williams Natural Gas Company.

Nancy J. Shanche and *Lisa A. Machesney* entered appearances for intervenor Cabot Petroleum Corporation.

Jack M. Wilhelm, Jon L. Brunenkant and *Mark R. Haskell* entered appearances for intervenor Amoco Production Company.

Nancy J. Shanche, Joseph E. Mixon and *David G. Stevenson* entered appearances for intervenor Amerada Hess Corporation.

James L. Trump, Paul F. Forshay and *Philip E. Ehrenkranz* entered appearances for Damson Oil Corporation.

William J. Grealis and *Jeffrey G. DiSciullo* entered appearances for intervenor Transwestern Pipeline Company.

Georgetta J. Baker entered an appearance for intervenor Natural Gas Pipeline Company of America.

Randall S. Rich and *Charles H. Shoneman* entered appearances for intervenors Bass Enterprises Production Company, American Trading and Production Corporation, Grace Petroleum Corporation, Petroleum, Inc. and J. Burns Brown Operating Company.

Gerald P. Thurmond, *Walker C. Taylor*, *Kim M. Brown*, *David J. Evans*, and *Patrick M. Ankuda* entered appearances for intervenor Chevron, USA, Inc.

Ernest J. Altgolt, III, entered an appearance for intervenor Conoco, Inc.

James U. Hamersley entered an appearance for intervenor Fina Oil and Chemical Company.

Stephen L. Teichler, *Kent K. Carter* and *Mario M. Garza* entered appearances for intervenor Anadarko Petroleum Company.

Richard T. Saas and *James B. Wilcox* entered appearances for intervenor Champlin Exploration, Inc.

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

In the decisions under review the Federal Energy Regulatory Commission addressed a problem arising from natural gas pipelines' and producers' adjustments of their contract relations in response to federal ceiling prices on interstate sales at the wellhead. The Federal Power Commission

(FERC's predecessor) initially attempted to conform to *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), which construed the Natural Gas Act to require such ceilings, by setting "just and reasonable" rates producer by producer. The process proved "laborious", so much so as to earn it recognition as the "outstanding example in the federal government of the breakdown of the administrative process". *Permian Basin Area Rate Cases*, 390 U.S. 747, 758, 88 S.Ct. 1344, 1355, 20 L.Ed.2d 312 (1968). The Commission then switched to setting "area" rates, governing sales by all producers in each of several regions.

The ceiling prices put interstate pipelines at a competitive disadvantage vis-a-vis intrastate pipelines, which could offer market prices. To mitigate that disadvantage, the interstates often agreed to include indefinite price escalator clauses in their long-term purchase contracts. After initial uncertainty, the Commission authorized one form of indefinite price escalator (an only one), the "area rate clause", which automatically raises the price to the area rate applicable at the time of delivery. See Order No. 329, 36 FPC 925 (1966), codified at 18 CFR § 154.93(b-1) (1990). The pipeline whose contracts are at issue here, Northern Natural Gas Company, agreed to such clauses in about 1200 contracts between the mid-1960s and 1978.

When Congress passed the Natural Gas Policy Act in 1978, it took away most of FERC's authority to set "just and reasonable" rates and instead provided statutory ceilings. See 15 U.S.C. § 3301 et seq. (1988). The question arose whether area rate clauses, which generally spoke in terms of escalation to "just and reasonable" rates set by the Federal Power Commission, authorized producers to demand the new NGPA ceilings. For gas covered by § 104 of the NGPA, for example, this would be the April 20, 1977 "just and reasonable" rate plus an adjustment for general price inflation thereafter. See 15

U.S.C. § 3314. The parties do not state what price would apply if the area rate clause did not authorize NGPA rates, but it appears likely that under most contracts the producer would be entitled to no more than the rate the gas had reached at some point before the effective date of the NGPA.

In Order No. 23, FERC Statutes & Regulations, Regulations Preambles 1977-1981 ¶ 30,040 (1979), FERC decided that area rate clauses indeed *could* be interpreted to authorize collection of NGPA rates. See *id.* at 30,315-16. If the parties to a contract agreed on that interpretation, their agreement would normally control. *Id.* at 30,316. If protestors (such as those here, a purchaser from Northern and representatives of downstream consumers) offered specific evidence that the clause in question did not supply contractual authority, the case would be set down for a hearing; if not, the protest would be dismissed. See Order No. 23-B, FERC Stats. & Regs. ¶ 30,065 at 30,455 (1979); Order on Rehearing Order No. 23-B, FERC Stats. & Regs. ¶ 30,073 at 30,475-76 (1979); see also 18 CFR § 154.94 (1990) (codifying the rules). The Fifth Circuit upheld these arrangements, with some modifications, in *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981). See also *Pennzoil Co. v. FERC*, 789 F.2d 1128 (5th Cir. 1986); *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988).

More than ten years ago Northern invoked the Commission's procedure, filing a list of over 1200 contracts containing area rate clauses that it and the relevant producers agreed authorized payment of NGPA rates. Various protestors challenged the submission, pointing to a statement by Peoples Natural Gas Company, than a division of Northern's parent company, made in litigation with a producer, that a specific area rate clause, worded exactly the same as some of those in the Northern contracts, did not require Peoples to pay NGPA ceiling rates. The Commission decided that "Peoples' interpretation of

the contract language can be attributed to Northern because of common control," see *Northern Natural Gas Co.*, 33 FERC ¶ 61,355 at 61,706 (1985), and that this satisfied the protestors' initial burden. It sent the matter to an administrative law judge for a hearing. *Id.*

After extensive discovery, including two opportunities for the protestors to review all of Northern's relevant files, the ALJ held the required hearing. Fourteen Northern officials and 56 producer witnesses testified for Northern and were cross-examined at length, producing a transcript of about 5400 pages. See *Northern Natural Gas Co.*, 43 FERC ¶ 63,015 at 65,147-48, 65,169 (1988) ("Initial Decision"); *Northern Natural Gas Co.*, 48 FERC ¶ 61,177 at 61,649 (1989) ("Order"), *reh'g denied*, 50 FERC ¶ 61,288 (1990). Another 58 producer witnesses were prepared to testify, but the ALJ decided that their testimony would be cumulative -- 56 was enough. The protestors offered no witnesses. See Initial Decision, 43 FERC at 65,147-48; Order, 48 FERC at 61,649.

The ALJ ruled that the evidence "over whelmingly" showed that Northern and the producers intended the area rate clauses "to trigger payment of all generally-applicable ceiling prices established by federal authority". See Initial Decision, 43 FERC at 65,149, 65,169. The ALJ considered the contract language, the parties' testimony of mutual intent, their course of dealing, their course of performance, and trade usage. *Id.* at 65,149-69. The Commission upheld the ALJ's decision, emphasizing the evidence of the parties' course of performance. Order, 48 FERC at 61,651-52. We affirm.

* * *

The ALJ framed the issue as being whether Northern and the producers "intended [area rate clauses] to trigger payment

of NGPA ceiling prices when the contracts at issue were entered into." Initial Decision, 43 FERC at 65,147 (emphasis omitted). The Commission's Order sometimes used a similar formula, see, e.g., 48 FERC at 61,648, and sometimes spoke of intent in a more generalized way, referring, for example, to evidence of "'Northern's intent to pay the highest prices allowed by law or regulation'", *id.* at 61,651 (evidently quoting a Northern witness). The latter formula tracks the Commission's conclusion in Order No. 23 that may gas producers and pipelines, in agreeing to area rate clauses, "intended to permit prices to escalate to the highest generally applicable ceiling rate allowed by governmental authority". FERC Stats. & Regs. at 30,314.

Neither formula seems to us to quite confront the reality of the case. It appears common ground that, at least until the latter party of the period, the parties were unlikely to have guessed that Congress would set the ceilings itself. For contracts of the earlier period, it seems something of a fiction to infer by "interpretation" that the parties "intended" escalation to statutory ceilings. Even the more general formula, which treats the parties' reference to Commission-determined rates as a short-hand for a broader intent (to escalate to the highest lawful rate), suffers the same flaw in a more subtle form: if the only issue the parties had occasion to address was fully solved by the narrower language, their intent as to the broader issue is hardly historical reality.

A number of contracts scholars frankly acknowledge the special character of such an inquiry. Farnsworth, for example, speaks of addressing issues that the contract language "omits", see E. Allan Farnsworth, Contracts §§ 7.15-.17 (1982), and Corbin distinguished between "interpretation", a term he reserved for exploring the meaning of words actually used, and "construction", which he applied to "filling gaps in the terms of an agreement, with respect to matters that the parties did not

have in contemplation and as to which they had no intention to be expressed", 3 Corbin on Contracts § 534 at 11 (1960). See also 6 Samuel Williston, A Treatise on the Law of Contracts § 825 (3d ed. 1962) (on "Fictitiously Imputed Intentions"). Thus a blunter way of framing the issue would be to ask whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses. The distinction is helpful, as we shall see shortly, because it puts in proper perspective a number of points raised by petitioners' counsel that assume the sole inquiry is into historical intent.

For the end of the period, while Congress was hammering out the terms of the NGPA, it can hardly be said that the parties omitted reference to statutory ceilings because they failed to foresee their arrival. For this period another reason comes into play (which indeed had been at work throughout the period, inhibiting anyone who did imagine the problem) -- the Commission's explicit rule that area rate clauses were the *sole* permissible form of indefinite price escalator. See 18 CFR § 154.93(b-1). [1] Here the inquiry more aptly concerns what the parties would have provided had the Commission allowed them to express their intent. As the Commission was obviously aware of the problem as it formulated Order No. 23, the order reflects its judgment that its earlier restriction of parties to area rate clauses should not prevent collection of statutory ceilings where the parties would have agreed to them. See FERC Stats. & Regs. at 30,315 (despite the limitations of 18 CFR § 154.93, FERC will give effect to escalator clauses that "specifically

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[1] Curiously, even the version published in 1990 contains only the reference to area rates, although the Commission had started setting *national* rates for certain gas in 1974. See Opinion No. 699, 51 FPC 2212 (1974).

permit escalation to Congressionally or legislatively authorized prices or which specifically reference Natural Gas Policy Act prices").

In affirming the ALJ, the Commission rested primarily on the evidence as to course of performance, which of course is probative whether one thinks of the problem in terms of historical or reconstructed intent. With narrow exceptions addressed later, Northern paid the NGPA ceilings for more than six years -- and not through oversight or inattention. Before the statute went into effect on December 1, 1978, officials of its Supply Division and its Law Department began internal discussions on the issue. See Initial Decision, 43 FERC at 65,160. Three days before the President signed the Act, a company attorney circulated a memo among the gas acquisition staff asserting that the area rate clauses in Northern's contracts entitled producers to charge the NGPA prices. See Memorandum from Patrick J. McCarthy (Nov. 6, 1978), *reprinted in* Joint Appendix ("J.A.") at 1614. Its conduct clearly conformed to this view for more than six years.

Protestors regard this long pattern as completely undermined by Northern's decision, implemented on January 1, 1985, to stop paying NGPA ceiling prices under the contracts at issue for categories of gas still subject to regulation. They claim this shift reveals that the prior six years' behavior was merely a ploy "to curry favor with Producers in a time of shortage", Reply Brief for Petitioners at 13 n. 13, and assert that Northern's true construction emerged only in 1985 when it stopped paying NGPA prices because of a gas glut. As the petitioners see it, the post-1984 evidence is paramount because it shows that Northern did not intend to be obligated by the area rate clauses to pay NGPA ceiling prices "*under all market conditions*". Brief for Petitioners at 19 (emphasis in original).

It is undisputed, however, that Northern sought price relief, in the form of contract amendments, without regard to whether the area rate clauses in its contracts were in any way applicable. See, e.g., Letter from Northern to Horizon Oil & Gas (Sept. 4, 1984) (form letter proposing contract amendments), *reprinted in* J.A. at 1970. Indeed, Northern acted the same as to contracts with clauses expressly referring to congressional price ceilings -- clauses that, while inconsistent with the language of 18 CFR § 154.93(b-1), the Commission had expressly found effective in Order No. 23. See Initial Decision, 43 FERC at 65,163; see also FERC Stats. & Regs. at 30,315. Moreover, Northern's price-reduction efforts focused heavily on gas that was deregulated as of January 1, 1985, and on which area rate clauses could have no effect. Even in the case of contracts that could be affected by area rate clauses, petitioners have uncovered no effort by Northern to justify its price cutback moves by a revisionist approach to those clauses. There is ample evidence to support the Commission's conclusion that the cutbacks were implemented not in reliance on the clauses but in spite of them. See Order, 48 FERC at 61,652; Initial Decision, 43 FERC at 65,163. Finally, petitioners' argument would seem to eliminate course of performance evidence from contract disputes. Some sort of resistance to past performance, on one side or the other, would seem a prerequisite to a dispute's ever landing in court. If performance is automatically negated by later resistance, then it is hard to imagine a case it would help resolve.

For their claim that the pre-1985 performance was variable, petitioners point to Northern's refusal to pay the special "tight sands" ceiling prices authorized by the Commission pursuant to § 107(c)(5) of the NGPA. But from the moment the Commission established the "tight sands" rate, it reasoned that the rate could only function as an incentive for producers to increase production of such gas if it was available only where

it was "a negotiated contract price"; FERC thus rejected reliance on a mere indefinite price escalator. See 18 CFR §§ 271.701-.703 (1990); see also *Pennzoil Co. v. FERC*, 671 F.2d 119 (5th Cir. 1982) (upholding the requirement); *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341 (D.C. Cir. 1987). In refusing to treat area rate clauses as justifying the tight sands rate, Northern merely hewed to the Commission's line.

The other alleged exception is the refusal of Northern's affiliate, Peoples Natural Gas, to pay NGPA rates (except for gas under § 104 of the NGPA) -- the conduct that led to the hearings in the first place. The ALJ found, however, that Peoples, a local distribution company regulated by state authorities, not by FERC, acted as it did because of concerns peculiar to its regulatory environment. In particular, Peoples feared (and later events proved) that Kansas regulators would refuse to allow it to pass NGPA rates through to its customers. See Initial Decision, 43 FERC at 65,166-67. The ALJ also found that the decisionmaking of the two affiliates was largely independent on the issue, a finding backed by substantial evidence. See *id.* at 65,167-68. Thus the course of performance evidence for the period prior to Northern's general effort to cut its gas costs back appears essentially unqualified.

Petitioners devote much of their brief to various witnesses' testimony that the intent of the clauses was just what they said (see, e.g., Brief for Petitioner at 54-58), that "just and reasonable" rates referred only to rates set by the Federal Power Commission (Brief for Petitioners at 51), and that the parties intended to conform to the Commission's requirements in 18 CFR § 154.93(b-1) (Brief for Petitioners at 58-60), and to documentary evidence of similar import (Brief for Petitioners at 45-49). If the issue were truly one of historical intent, these might be telling blows. But when the problem is viewed as one of how to fill a contract gap -- how to address a circumstance

that the contract plainly omitted -- the statements look irrelevant and even tautological.

We note that even petitioners' literalism has bounds. Even though the escalation clauses conforming to the language of 18 CFR § 154.93(b-1) could refer only to *area* rates, petitioners appear not to read them as excluding coverage of the *national* rates that the Commission started to promulgate in 1974. See Opinion No. 699, 51 FPC 2212 (1974). Nor, even for clauses referring only to the Federal Power Commission, do petitioners read them as excluding coverage of rates set by FERC after its creation in 1977. [2] While this is not necessarily a case of straining at a gnat after swallowing a camel, it leaves us puzzled as to petitioners' principle of construction.

The petitioners also point to testimony suggesting rather obliquely that Northern would not have agreed to price escalator clauses that would require it to "pay even if its customers won't pay Northern for the gas", see J.A. at 983; Brief for Petitioners at 53, *i.e.*, if the escalated price exceeded what Northern's customers were willing to pay. Indeed, as Congress obviously cannot reexamine natural gas pricing as frequently as a regulatory commission, the shift to statutory ceilings carried the risk that the ceilings would outrun the market, as in fact occurred. But that shift also contained the risk of ceilings well below market-clearing prices. As the ceilings would bind if they were below market, at the expense of producers, it is hardly surprising for the parties to have agreed that pipelines should bear the opposite risk.

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[2] See Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977), terminating the FPC and replacing it with FERC.

Moreover, the ALJ reasoned that pipelines would be more concerned with the *average* price of gas than with the risk of some above-market purchases. See Initial Decision, 43 FERC at 65,158. The point is quite correct: interstate pipelines, operating under average-cost price regulations, do not "lose" the difference between the cost and selling price of a unit of gas (bought for more than the selling price), as would an unregulated firm; the above-average unit is "rolled" into the average, i.e., it gives the pipeline legal authority to charge a higher price. See *Id.* FAnd, if rate regulation has held the pipeline's rates to a relatively inelastic portion of its demand curve, materially below the level that would maximize its profits in an uncontrolled market, the pipeline will be able to charge the higher lawful rate with only a limited offsetting reduction in sales. An unregulated firm, by contrast, would presumably charge profit-maximizing rates anyway, and any purchase at a price above that rate would simply cost it money.Further, the Commission's analysis of the effect of area rate clauses leaves untouched any price-reduction claims and any defenses to non-performance that a pipeline might assert under other clauses of the contracts (such as market-out clauses) or under general contract doctrines (such as impracticability). Finally, petitioners have framed the argument as a general one that appears to dispute the basic premises of Order No. 23 -- the sort that we have ruled out as a collateral attack on Order No. 23. *Associated Gas Distributors v. FERC*, 810 F.2d 226, 231-33 (D.C.Cir. 1987).

The last of petitioners' claims that is marginally worthy of discussion is their suggestion that Northern and the producers did not meet their burden for the numerous contracts as to which no *producer* witness testified (what petitioners call the problem of "non-appearing producers" or "NAPs"). The petitioners' idea appears to be that there is a failure of evidence as to such contracts. But the testimony of the Northern witnesses encompassed all the contracts, as did the course of performance

evidence. The 56 producer witnesses confirmed Northern's picture (as was to be expected in view of the producers' interest in escalated prices). In the absence of some hint that matters were different for *any* other producer, there was no reason for the ALJ to acquiesce in petitioners' effort to further bloat the proceedings. Compare *Pennzoil Co. v. FERC*, 789 F.2d at 1145 n. 44; see also Order No. 23-B, FERC Stats. & Regs. ¶ 30,065 at 30,453-55 (anticipating pipeline-by-pipeline review of protests, with initial submission of evidence only by pipelines).

Finding substantial evidence in support of the Commission's orders, we deny the petitions for review.

So ordered.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Docket No. GP80-43-019

Order Denying Rehearing

(Issued March 9, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On September 1; 1989, the South Dakota Public Utilities Commission and the Peoples Natural Gas Company, jointly, and Minnesota Public Utilities Commission (collectively, petitioners) filed requests for rehearing of the Commission's order affirming Initial Decision issued herein on August 2, 1989.[1] Each argues that the Commission's decision is contrary to the record evidence and case precedent. This order denies the requests for rehearing.

Background

This is a third-party protest proceeding conducted pursuant to the Order No. 23 series of rulemakings.[2] It involves the proper interpretation of area rate clauses in more than 1200 natural gas purchase contracts executed prior to

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[1] 48 FERC ¶ 61,177 (1989).

[2] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979), *aff'd in part and modified in part, Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (*Pennzoil I*).

passage of the Natural Gas Policy Act of 1978 (NGPA) between Northern Natural Gas Company, Division of Enron Corp. (Northern) and various producers (Producers) (collectively, Parties).

In November 1979 the Minnesota and South Dakota Public Utility Commissions (PUCs) and the Commission staff (collectively, Protestors) objected to the Parties' claim that area rate clauses authorized Northern to pay ceiling prices established by the NGPA for certain categories of gas subject to the Commission's jurisdiction.

The precise issue is whether the Parties intended area rate clauses to trigger payment of NGPA ceiling prices when the contracts at issue were entered into.[3] The Parties agree that they had such an intent. Under Order No. 23 third-party protest procedures, where the contracting parties agree that an area rate clause was intended to authorize collection of ceiling prices under the NGPA there is a presumption in favor of their interpretation. Third-party protesters have the burden to produce reliable and probative extrinsic evidence which specifically contradicts the parties' intent in order to rebut this presumption.[4] Once that burden is met, the presumption disappears, and a hearing is required at which the contracting parties have the burden of proof to establish that their mutual intent at the time of contract execution was that the area rate

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[3] *Northern Natural Gas Company*, 33 FERC ¶ 61,355, at p. 61,706 (1985).

[4] *Associated Gas Distributors v. FERC*, 810 F.2d 226, 228 (D.C. Cir. 1987).

clauses in issue would allow for payment of NGPA ceiling prices.[5]

In this case, Protestors primarily relied upon a pleading filed by Peoples Natural Gas Company (Peoples), an affiliate of Northern, in a Kansas declaratory judgment action involving interpretation of an intrastate area rate clause in Peoples' contracts (Kansas action).[6] Peoples averred that any price escalation under the area rate clause was limited to administratively established cost-based rates. The Commission held that without regard to whether Peoples and Northern operated independently, Peoples' position that the area rate clause in its contracts -- identical to one of Northern's area rate clauses -- was not intended to authorize NGPA rates, "could be considered reliable and probative extrinsic evidence to contradict the interpretation given to that clause by Northern."[7] Accordingly, the matter was remanded for a hearing on the merits. The intention of the parties in agreeing to area rate clauses was the issue set for hearing.

At the hearing, Protestors called no witnesses and so were limited to cross-examination of the Parties' witnesses. Protestors cross-examined fourteen Northern witnesses and fifty-six Producer witnesses. After observing and listening to the witnesses at the hearing, and upon reviewing the proffered but

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[5] *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (Pennzoil I).

[6] *McCoy Petroleum Co. v. Peoples Natural Gas Co.*, No. 80-1571 (D. Kan. 1980).

[7] 33 FERC ¶ 61,355 (1985), *reh'g denied*, 34 FERC ¶ 61,261, at p. 61,455 (1986).

not introduced testimony of the remaining fifty-eight Producer witnesses, the Presiding Judge determined that there was no point in requiring those witnesses to testify since no new information would be elicited from them. The presiding judge concluded that at the time they entered into the contracts the parties intended the area rate clauses "to trigger payments of all generally applicable ceiling prices established by federal authority."[8] The Commission's order of August 2, 1989, affirmed the Initial Decision and dismissed the protests noting that the court's ruling in *Hunt*[9] had disposed of most of the Protestors' exceptions.[10]

Requests for Rehearing

The requests for rehearing present no new arguments or analyses which were not previously considered in this proceeding. Both the Initial Decision and the order approving the Initial Decision were lengthy and thorough. No purpose would be served by repeating those discussions here. However, further explication may be in order on several issues, which we note below.

Petitioners renew their argument that *Pennzoil I* requires that evidence be produced and findings be made on a contract-by-contract basis.

Petitioners continue to argue that the course of performance supports their contention that the area rate clauses did not allow NGPA prices. Petitioners point out that the

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[8] 43 FERC ¶ 63,015 (1988).

[9] *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988).

[10] 48 FERC at p. 61,651.

highest authorized NGPA price was not consistently paid under the contracts.

Petitioners further argue that the judge erred as a matter of law by not attributing to Northern the position taken by Peoples in the Kansas action as to the intent in entering into area rate clauses. Petitioners point out that Peoples was a division of Northern and shared certain key personnel and argue that the two companies could not act independently.

Finally, Petitioners claim that the judge's ruling that he credited the Parties' evidence as to intent and that "Protestors have not introduced even a scintilla of direct evidence to the contrary" is fatally flawed because he held "evidence elicited on cross-examination is not substantive evidence."[11] This they assert is clearly erroneous and they allege that the judge ignored reliable evidence elicited from various witnesses on cross-examination.

Discussion

We find nothing in *Pennzoil I* to support Petitioners' contention that there must be a finding on a contract-by-contract basis. *Pennzoil I* held that, in spite of a general rule that area rate clauses could be sufficient authority to collect NGPA prices, whether or not price escalator clauses provided for NGPA maximum prices is an issue which should be decided on a case-by-case basis. The court did not find that a contract-by-contract review was required. By the term "case-by-case," the court was referring to individual controversies. There is no language which supports the petitioners' reading of *Pennzoil I* that each contract involved in a controversy must be physically produced and individually contested. Here, the case in controversy

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[11] 43 FERC at p. 65,148.

involves several types of contracts and the judge considered testimonial evidence from Northern (a party to all the contracts) and other evidence sufficient to establish the parties' understanding of area rate clauses in those contracts.

Northern paid NGPA ceiling prices from December 1978 to 1985. The fact that the highest possible authorized NGPA price may not always have been paid under the contracts does not answer the question at issue, which is whether the parties intended the escalation clause to authorize NGPA prices or only the just and reasonable area rates set by the Commission. Any payment based on NGPA rates supports the Initial Decision -- even if the rate was not the maximum allowable NGPA rate. The argument that Northern and producers did not agree to the collection of higher prices under special relief pricing does not refute the intent to pay NGPA prices in general. Further, the fact that after 1985 Northern ceased paying the NGPA section 108 ceiling price does not undermine the conclusion that the course of performance supports the Parties' interpretation of their area rate clause. As the prior order noted, Northern's action was similar to that of many other interstate pipelines who at that time sought to reduce the cost of the gas they were purchasing. Moreover, Northern's action in 1985 was unilateral since a number of producers commenced suit asserting that Northern's action was in breach of contract. Under *Hunt*, Northern's unilateral action does not contradict the prior course of conduct which confirmed the Parties' mutual intent in entering into the area rate clause.

In reaching the decision that the Protestors had submitted sufficient evidence to prevent summary dismissal, the Commission found that, because of common control, Peoples' statements as to the meaning of the area rate clause which differed from Northern's stated interpretation, had rebutted Northern's interpretation with "reliable and probative extrinsic

evidence."[12] However, this finding does not dispose of the issue of what was Northern's intent. The focus of the Commission in the prior proceeding was on the issue of whether Protestors had submitted sufficient evidence to rebut the presumption so a hearing was justified. The Commission found that Peoples' position statements met this burden. However, that did not, nor could it, constitute a finding as to the meaning of Peoples' contract, nor whether that meaning was also applicable to Northern's contracts.

All evidence -- contract language, oral and written extrinsic evidence and evidence of the course of performance -- must be weighed to determine the parties' intent.[13] In *Hunt*, the court found that course of performance evidence had "controlling weight."[14] The evidentiary weight of Peoples' statements made in a defensive posture as part of an answer to a complaint, is insufficient to overcome the weight of the evidence of the course of performance by Northern in paying the NGPA price.

Though the judge reached his conclusion after reviewing documentary and testimonial evidence,[15] the Commission

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[12] 33 FERC at p. 61,706.

[13] 853 F.2d at 1237, citing to *Pennzoil Co. v. FERC*, 789 F.2d 1128 at 1141 (5th Cir. 1986)(Pennzoil II).

[14] 853 F.2d at 1237.

[15] The order stated: In reaching his conclusion the judge reviewed and discussed the applicable legal standards; the language of the area rate clauses; the testimony of mutual intent

(continued...)

disagrees with the judge's statement concerning the evidentiary value of testimony elicited on cross-examination. Therefore, the Commission has reviewed the record including the pleadings and evidence elicited on cross-examination. The Commission finds convincing evidence supporting the ultimate finding that the Parties had carried the burden of establishing their interpretation that the area rate clause authorized NGPA rates.

The Commission orders:

The requests for rehearing in this docket are denied.

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[15](...continued)
by Northern and by the producers; the course of dealing under the commercial and regulatory context; the course of performance under the commercial and regulatory context both pre- and post-NGPA; the usage of trade; and the "Peoples evidence" (Peoples' intent and the effect of Peoples' intent on Northern). In the course of this analysis, the presiding judge evaluated the record evidence and credited the parties' witnesses. 48 FERC at p. 61,649.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Division of InterNorth, Inc., Docket No. GP80-43-009 (Phase I)

Order Affirming Initial Decision

(Issued August 2, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

[Note: Initial Decision of the presiding administrative law judge issued May 11, 1988, appears at 43 FERC ¶ 63,015.]

This is a case specific application of the third party protest procedures under Order No. 23.[1] It specifically relates to the proper interpretation of area rate clauses contained in natural gas purchase contracts between Northern Natural Gas Company (Northern) and various producers (producers) (Northern and producers called the parties) prior to the passage of the Natural Gas Policy Act of 1978 (NGPA). After a hearing, the presiding judge concluded that the parties had established that at the time they entered into the contracts they intended the area rate clause "to trigger payments of all

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[1] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979) ("Order No. 23"), *aff'd in part and modified in part, Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("*Pennzoil I*").

generally-applicable ceiling prices established by federal authority."[2] We affirm the initial decision, dismiss the protests and terminate the proceeding.

Background

Under the Natural Gas Act (NGA), a producer could only collect the just and reasonable rate established by the Federal Power Commission and then the Federal Energy Regulatory Commission (both referred to as the Commission) in rate proceedings. These rates were initially established for individual producers, then by areas, *In re Permian Rate Case*, 370 U.S. 747 (1968), and eventually on a nationwide basis, *Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

Moreover both under the NGA and the NGPA any rate increase has to be contractually authorized. Accordingly, "indefinite price escalator clauses" were included in gas purchase contracts to permit the producer to collect any higher price established by the Commission whereby specified events would trigger price rises to a level determined by the particular event. The Commission, by regulation, rejected most clauses of this sort as contrary to the public interest, *see* 18 C.F.R. § 154.93 (1986), but did not invalidate clauses that tied the contract price to the "area rate" the Commission periodically established. *Id.* When the Commission shifted from area ratemaking to national ratemaking, it continued the earlier treatment by reading the area rate clauses as national rate clauses. *See Pennzoil I* at 367.

Shortly after Congress passed the NGPA, which provided for Congressionally set rates promulgated by Congress, the

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[2] 43 FERC ¶ 63,015 (1988).

Commission issued interim regulations expressing the tentative position that a pre-NGPA area rate clause in an interstate contract did not provide contractual authority to collect NGPA ceiling rates.[3] However, within a short time, the Commission issued Order No. 23 in which it found that in enacting the NGPA Congress did not intend to preclude payment of NGPA rates under area rate clauses. Instead, the Commission ruled that whether or not a particular area rate clause supports payment of NGPA rates turns on a question of the parties' intent.[4]

Under Order No. 23, the Commission required pipeline purchasers to file evidentiary submissions under section 154.94 of the regulations, 18 C.F.R. §154.94, which listed the contracts for which NGPA rates were claimed, the area rate clause at issue, and the pipeline's position on the claimed entitlement to NGPA rates under the area rate clause. Where the parties to the contract agree that an area rate clause was intended to authorize the collection of the maximum lawful price (MLP) under the NGPA there is a presumption in favor of the parties' interpretation. Third parties seeking to refute the parties' mutual statement of intent were required to file protests containing reliable and probative evidence which, if true, would contradict that stated intent.[5]

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[3] Interim Regulations Implementing the Natural Gas Policy Act of 1978 and Regulations under the Natural Gas Act, *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,008 at p. 32,072 and p. 32,074 (1979).

[4] *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040, at pp. 30,309-15.

[5] Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065 (1979).

In August 1979, Northern filed its evidentiary submission which affirmed its intent and that of its producer-suppliers that the area rate clauses in approximately 1200 interstate contracts were intended to authorize the payment and collection of the highest applicable regulated rate, necessarily including ceiling rates established under the NGPA. On November 13, 1979, the Minnesota Public Utilities Commission (Minnesota PUC) and the South Dakota Public Utilities Commission (South Dakota PUC) filed third-party protests. The Commission Staff ("Staff") also filed a third-party protest on November 21, 1979. All protests relied exclusively on the language of the Northern producer's area rate clause. Staff later supplemented its protest with a pleading filed by Peoples Natural Gas Company ("Peoples"), an affiliate of Northern, in a Kansas declaratory judgment action involving interpretation of an intrastate area rate clause.[6] In that case Peoples averred that any price escalation

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[6] Until May 1952, Peoples was a wholly owned subsidiary corporation of Northern, when it became an operating division. From May 1952 until a change in corporate name in March 1980, Northern conducted its interstate pipeline operations through its wholesale operating division and its retail distribution operations through its intrastate operating division, Peoples. After the corporate name change, interstate pipeline operations were conducted through Northern Natural Gas Company, Division of InterNorth. Peoples, as a division of InterNorth, conducted local distribution. InterNorth changed its name to Enron Corporation in April, 1986. Peoples was divested in 1980. In 1985 UtiliCorp United Inc. purchased Peoples. Thereafter, Peoples Natural Gas Company filed a petition to intervene out-of-time as a third-party protestor in this proceeding. To avoid confusion, Peoples Natural Gas Company as a third-party protestor is referred to herein as "PNGC,"

(continued...)

under the area rate clause was limited to administratively established cost-based rates.[7]

On August 31, 1983, the Presiding Judge issued an order phasing the case to test the "threshold issue" of whether the protests contained reliable and probative evidence of Northern's intent such that further proceedings would be necessary.[8] On August 10, 1984, the Presiding Judge issued an Initial Decision finding that the Protestors' evidence was not reliable and probative evidence which contradicted the parties' mutual statements of intent; therefore, no further hearings were necessary.[9] The Commission reversed[10] stating that without regard to whether Peoples and Northern operated independently, Peoples' position that the area rate clause in its contract--identical to Northern's area rate clause--was not intended to authorize NGPA rates, "could be considered reliable and probative extrinsic evidence to contradict the interpretation given to that clause by Northern."[11] Accordingly the matter was

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[6](...continued)
whereas Peoples Natural Gas Company prior to 1985 is referred to herein as "Peoples." All four active third-party protestors are referred to as "Protestors."

[7] *McCoy Petroleum Co. v. Peoples Natural Gas Co.*, No. 80-1571 (D. Kan. 1980).

[8] 24 FERC ¶ 63,085 (1983).

[9] 28 FERC ¶ 63,028.

[10] 33 FERC ¶ 61,355 (1985), *reh'g denied*, 34 FERC ¶ 61,261 (1986).

[11] *Id.* at p. 61,455.

remanded for a hearing on the merits. The intention of the parties in agreeing to the area rate clause was the issue set for hearing.

At the outset of the hearing the judge ruled that NGPA sections 104 and 106(a) contracts were at issue, producer intent remains established as a rebuttable presumption, and that certain specific types of area rate or other clauses were or were not at issue, depending upon discovery. The hearing commenced on November 12, 1986. Fourteen Northern witnesses and 56 producer witnesses testified and were subjected to extensive cross-examination.[12] Approximately 58 producers who had submitted prepared testimony did not testify following the presiding judge's ruling that their testimony would be cumulative. Protestors did not file testimony.[13]

On May 11, 1988 the judge issued his decision dismissing the protests and terminating the proceeding. In reaching his conclusion the judge reviewed and discussed the applicable legal standards; the language of the area rate clauses; the testimony of mutual intent by Northern and by the producers; the course of dealing under the commercial and regulatory context; the course of performance under the commercial and regulatory context both pre- and post-NGPA; the usage of trade; and the "Peoples evidence" (Peoples' intent and the effect of Peoples' intent on Northern). In the course of this analysis, the presiding judge evaluated the record evidence and credited the parties' witnesses. Briefs on Exceptions were filed by Staff,

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[12] There are approximately 5400 pages of transcript.

[13] The judge accepted into evidence numerous exhibits proffered by protestors and expressly limited the use of those exhibits for impeachment purposes.

South Dakota PUC, Minnesota PUC and PNGC. Briefs opposing exceptions were filed by Northern and Producers.

Discussion

In order to assess the validity of the arguments raised by protestors we shall briefly discuss the applicable legal standard. This proceeding is a third-party protest, subject to the Order No. 23 series of rulemakings. The parties to the contract agree on their intent under the area rate clause and thus there is a rebuttable presumption in favor of that interpretation. However, because of the existence of the Peoples evidence, the Commission found that Protestors had satisfied the burden of coming forward with reliable and probative extrinsic evidence to contradict that interpretation. Thus a hearing on the merits was ordered at which the parties to the contract have the burden of proof to establish their intent. Under *Pennzoil II*,[14] the Commission:

> is obligated to construe the contracts to determine whether they authorize NGPA rates or not, taking into account the language of the contracts and *all* the extrinsic evidence of intent presented, including the parties' assertion of mutual intent.[15]

This is so because if a hearing is required, only the presumption disappears, and not the evidence from which the presumption arises, which was still entitled to evidentiary weight. Moreover, in making its factual determinations after the presiding judge's

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[14] *Pennzoil Co. v. FERC*, 789 F.2d at 1128 (5th Cir. 1986).

[15] *Id.* at 1141 (emphasis in original).

initial resolution of the parties' intent, the Commission, while not strictly bound by the judge's credibility determinations, is to afford the credibility findings of the presiding judge special weight, and such findings are not to be easily ignored.[16]

To date, of all the Order No. 23 proceedings, only this one, and one other, involving United Gas Pipe Line Co. (United), Docket No. GP80-41 have required a hearing. The court rulings in the *United* case support the conclusion we reach here. Accordingly, we shall review that case and the application of the rulings therein to this case.

In that case, after United had filed the evidentiary submission under Order No. 23 to permit collection of the NGPA rate, third parties filed protests. The crucial evidence was an April 23, 1979 letter from United to producers stating it did not believe the area rate clause was intended to authorize paying the NGPA section 108 prices for stripper well gas.[17] United stated that when the area rate clauses were entered into the rate of production was never a criterion for determining the pricing category of gas and thus it could not have intended to pay the higher stripper well price by entering into the area rate clause. In August 1979 United retracted the April letter, and paid the section 108 price to producers for the stripper well gas.

A hearing was ordered to determine the parties' intent with respect to stripper well gas because the Commission held that the April 23 letter was "reliable and probative extrinsic

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[16] *Id.* at 1145 n.44.

[17] Stripper wells are wells producing less than 60 Mcf per production day. 15 U.S.C. § 3318(b) (1982).

evidence" contradicting the mutual intent of the parties.[18] The presiding judge found there were eight distinct types of clauses in the 775 various gas contracts at issue. Construing the language together with the extrinsic evidence he concluded that two types of the clause, Type I and IV did not authorize collection of the section 108 rate, but that the other six did. The Commission reversed and held that there was contractual authorization only as to one type of clause, Type VIII.[19] The Commission stated that the April 1979 letter effectively negated the parties' mutual assertions of intent, so that the contract language was no longer controlling, and the parties had the burden of proving intent based upon the extrinsic evidence, which burden they had not met.

In *Pennzoil II* the Court vacated and remanded the case because it found that the Commission had erred as to the nature and consequences of the presumption under Order No. 23. The presumption merely shifts the burden of the parties' evidence with respect to the presumed fact, which in this case was the parties' mutual intent to authorize NGPA rate. Once the presumption disappears because Protestors had introduced extrinsic evidence rebutting the presumption, the factual issue

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[18] 11 FERC ¶ 63,018 (1980), *remanded*, Opinion No. 135, 17 FERC ¶ 61,232 (1981), *reh'g denied*, Opinion No. 215-A, 28 FERC ¶ 61,018 (1984), *aff'd*, *Associated Gas Distributors v. FERC*, 810 F.2d 226 (D.C. Cir. 1987). Payment of the other NGPA rates was permitted because United's April 1979 letter related only to section 108 gas.

[19] Opinion No. 181, 24 FERC ¶ 61,083 (1983), *reh'g denied*, 27 FERC ¶ 61,199 (1984).

is to be resolved at a hearing.[20] The court found that the Commission's analysis deviated from this standard because (1) it failed to give any further evidentiary weight to the parties' assertion of mutual intent; (2) it gave undue weight to Protestors' rebuttal evidence which was the April 1979 letter, and (3) it refused to give evidentiary weight to the language of the contracts. On remand, the Commission adopted the presiding judge's initial decision, in which he concluded that clauses Types I and IV did not authorize collection of NGPA rates but that all the other types did.[21] The Commission reasoned that but for its misapprehension of the Order No. 23 presumption, it would have adopted that decision originally, and it was now adopting the decision on remand.

Upon appeal, the court reversed and directed the Commission to enter a final order as to Type I clause as also authorizing the NGPA rate.[22] The court found that the presiding judge had in effect disregarded the extrinsic evidence of intent which he found was ambiguous and instead had relied solely on the contract language "as the only reliable evidence of the parties' intent".[23] That language he concluded did not authorize the NGPA rate. The court stated that because of the

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[20] The court characterized the approach as the Thayer "bursting bubble" theory of presumption. *See* 789 F.2d at 1136-37.

[21] 40 FERC ¶ 61,062 (1987).

[22] *Hunt Oil Co. v FERC*, 853 F.2d 1226 (5th Cir. 1988) (*Hunt*). No appeal was taken as to Type IV, which apparently was contained in only one contract.

[23] 853 F.2d 1226 at 1237, *citing* 20 FERC ¶ 63,050, at p. 61,226 [sic] p. 65,226.

presiding judge's "failure to acknowledge the controlling weight of this substantial evidence"[24] as to the course of performance, the Commission's decision was not supported by substantial evidence and had to be vacated. Furthermore, the court agreed with producers that whatever the significance of the April 1979 letter, United's August 1979 retraction letter, and United's payment of the NGPA rate thereafter, constituted modification of the contract, which further supported the conclusion that payment of NGPA rates was intended. The court held that even if United's motive in sending the August letter was a desire to maintain good relations with the producers, as the Commission reasoned, that would not preclude a finding that there had been a modification. Moreover, the parties' "consistent and unbroken performance subsequent to the August retraction letter in paying and receiving and retaining the higher NGPA rate for the stripper well gas" was "the most compelling corroborations evidence of the contract modification."[25] Consistent with the court's directive, the Commission issued an order that producers were entitled to collect the NGPA section 108 rate on Type I clauses, as well as the other types of clauses.[26]

Hunt mandates that we affirm the initial decision. But even apart from *Hunt* we would have reached that determination. To place the exceptions in the proper perspective,[27] we shall briefly note the analysis adopted in the initial decision and show

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[24] 853 F.2d at 1237.

[25] *Id.* at 1239-40.

[26] *United Gas Pipe Line Co.*, 46 FERC ¶ 61,370 (1989).

[27] The exceptions total more than 500 pages.

how it meets the *Hunt* standard, and then review the exceptions that require discussion after *Hunt*.

The judge first looked at the contract language. He found that none of the clauses restricted the ability to collect NGPA rates and the particular words were unimportant because the parties changed the area rate clause's wording to be consistent with the Commission's regulations.[28] Thus there had to be an evaluation of the extrinsic evidence to determine the parties' mutual intent. The parties offered witnesses who maintained that the area rate clauses "represented Northern's intent to pay the highest prices allowed by law or regulation." Protestors offered no witnesses but sought to impeach the parties' witnesses. However the judge was satisfied that the testimony of the parties' witnesses should be credited even though a witness may have had less than complete knowledge.[29]

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[28] *Supra*, p. 2. Moreover, the Commission has held that use of the words "just and reasonable" in an escalation clause is subject to conflicting interpretation because it could have been used to mean the "maximum legally permissible prices, since said prices were required to be just and reasonable under the governing statutes then in effect . . ." Opinion No. 77, 10 FERC ¶ 61,214, at p. 61,397 (1980).

[29] None of Protestors' exceptions challenging the presiding judge's credibility determination has merit. We should note that in *Pennzoil II*, the court stated (789 F.2d at 1141):

> In large measure, this ultimate resolution involves a fact question that turns on credibility determinations. The Commission must make those difficult credibility determinations and

(continued...)

Moreover the parties' course of performance both pre-NGPA as well as post-NGPA showed that both Northern and producers treated area rate clauses as triggering payment of the applicable ceiling price. The judge also reviewed the Peoples' evidence to see if it refuted the parties claimed intent.

The court's ruling in *Hunt* disposes of most of Protestor's exceptions because the course of performance is "controlling weight of ... substantial evidence of the parties' intent"[30] and the judge found that both pre-and post-NGPA, Northern paid the applicable ceiling price established by the federal

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[29](...continued)

> answer the factual inquiry as did the ALJ in this case. It is simply unacceptable for the Commission to avoid the determination by stating that the producers procedurally failed to adduce sufficient evidence to sustain their burden of proof. As a matter of law, the amount of evidence presented by the producers, if believed, amply demonstrated contractual authorization under the contracts.

[30] *Hunt*, *supra* at 1237.

regulations.[31] We shall briefly address Protestors' exceptions as to the course of performance.

With respect to the pre-NGPA period, Protestors argued that since Northern did not pay the rates established by the NGA special relief procedures, this demonstrated that Northern did not intend to pay the highest applicable rates and thus could not have intended the area rate clause to authorize the NGPA rates. The judge found no merit in this because the special relief procedures were exactly what the name connoted-special procedures. Those procedures permitted payment above the ceiling price but required a party to file for it on an individual basis. In their exceptions, Protestors continue to refer to Northern's refusal to pay the higher special relief rates under the area rate clause. We agree with the judge's conclusion that the special relief rate is not relevant to the area rate clauses. That Northern did not pay the special relief rate has no bearing on the parties' intent in entering into area rate clauses because the special rate is a separate and distinct rate. A party could seek such relief without regard to whether its contract had an area rate clause.

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[31] Peoples' exceptions assert that Northern's actions in paying the NGPA prices were based in part on considering producer relations which would contradict the finding that the decision to pay NGPA prices was based on intent (Peoples Brief on Exceptions at 97). However, in *Hunt*, the court held, that "an intent by United to maintain a good working relationship with its producers does not preclude a finding that the parties did in fact modify their contract to provide for the collection of the NGPA rates..." 853 F.2d at 1238. It similarly follows that if Northern paid the NGPA rate, the fact that one element may have been a desire to maintain good relations with the producers does not eliminate the fact that the NGPA rate was in fact paid.

With respect to the post-NGPA period, apart from the Peoples' evidence, which we shall discuss separately, the major thrust of Protestors' exceptions relates to the judge's conclusion that Northern consistently paid the NGPA ceiling price after December 1, 1978.

Although Protestors argue that Northern did not always pay the NGPA rate,[32] they fail to substantiate that claim except as to the post-1985 prices. Staff argues that after enactment of the NGPA Northern directed its buyers not to agree to section 108 prices in new contracts. However, that in no way contradicts the judge's finding because that related to new contracts, not existing contracts. Similarly Staff's argument that Northern's refusal to pay NGPA section 110 add-ons to some producers demonstrates that Northern did not intend to authorize payment of NGPA ceiling prices has no merit. The Commission's regulations separate procedures for the recovery of certain production-related costs. Section 271.1104(c)(4)(ii)(B) provides for collection of certain production related costs under an area rate clause. However, an area rate clause is evidence only of the purchaser's willingness to compensate for delivery charge, but not for compression charges. Thus Northern's conduct with respect to section 110 add-on has no bearing on its intent with respect to authorizing NGPA ceiling prices.

Protestors also refer to Northern's pricing actions after January 1, 1985 in arguing that the judge erred, because those actions they contend, establish that Northern did not intend to authorize NGPA pricing when entering into the area rate clauses. First Protestors argue that the judge erred because of the

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[32] *See, e.g.* Staff Brief on Exceptions, at 98.

evidence of Northern's refusal to pay the Order No. 451 price.[33] If a contract had an area rate clause, the producer could utilize Order No. 451 [*FERC Statutes and Regulations* ¶ 30,701]. However, this did not automatically entitle the producer to the higher price. We agree with the judge's analysis that the procedure under Order No. 451 is similar to the negotiated contract issue under NGPA section 107. The area rate clause related to the price that would automatically apply because of an event or act of an outside party. We have held that while an area rate clause permits escalation to the NGPA price, it does not provide authorization for the tight sands price under NGPA section 107 absent the purchaser's agreement.[34] Thus, where a subsequent agreement is required to obtain a higher price, the refusal to enter into such agreement has no bearing on the issue of the original intent in entering into the area rate clause.

Protestors also point to Northern's conduct after January 1, 1985, when it paid less than the NGPA ceiling prices for gas still subject to price regulations, such as NGPA sections 102(d) and 108. The judge held that Northern, like many other interstate pipelines, was seeking to reduce the rates under its contracts because of the changed economic environment. There was no evidence that Northern was relying upon the area rate clause, but rather it was doing it in spite of the area rate clause

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[33] That order establishes for all vintages of gas under NGPA sections 104 and 106 an alternative maximum lawful price if the price is established under a contract executed after July 18, 1986 or the purchaser has agreed to pay the higher price under an existing contract.

[34] *See* Colorado Interstate Gas Co. (CIG), 45 FERC ¶ 61,293 (1988).

and that this conduct, in 1985, was not inconsistent with the parties' asserted intent when the area rate clause was entered into. Since Protestors concede that a number of producers commenced suit against Northern for breach of contract, it is clear that Northern acted unilaterally. Such unilateral action does not constitute mutual agreement as to the parties' intent in entering into the area rate clause.[35] Accordingly, we find no merit in Protestor's exceptions.

The Peoples' Evidence

The Peoples' evidence related to the position taken by Peoples after the NGPA became effective that the area rate clause in its intrastate gas contracts did not entitle the producer to NGPA prices except to the extent the higher prices were cost-based. Peoples, at that time a division of an interstate pipeline and an affiliate of Northern, maintained that position when producers sued for the higher price. The presiding judge originally had held that since Peoples and Northern operated independently, Peoples' statement could not be attributed to Northern. Moreover, even if it could, it was not reliable and probative extrinsic evidence because different contracts are involved and the circumstances giving rise to them were different. The Commission reversed finding that the evidence was sufficient to meet the Protestors' initial burden because if the judge had required a hearing to determine whether Peoples' intent could be ascribed to Northern, then *ipso facto* Protestors were entitled to a hearing under the Order No. 23 procedures. However, the Commission did not rule on the merits of the protest, stating "The intention of the parties in agreeing to this provision is precisely the issue set for hearing".[36]

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[35] *See Hunt, supra*, 853 F.2d at 1237.

[36] 33 FERC at p. 61,706.

After hearing, the judge held that the original intent of Peoples in entering into the area rate clause was to pay the same price for gas as the interstate price for gas. However, it took the position it did after enactment of the NGPA because of the uncertainty whether the state agency would permit a pass through of those higher prices. Moreover, whatever Peoples' initial position, the record showed that it paid the NGPA sections 104 and 106 prices if that price exceeded the fixed price in its gas purchase contract. The judge also held that regardless of what Peoples may have intended, that intent was not Northern's intent because the evidence established that they operated independently and in "different regulatory environments." Also there was no evidence to show that there was a "commonality of actions or policy".[37] Moreover, even if there was, and there was a conflict of views as to the area rate clause's meaning, there was no evidence Peoples could dictate to "its much larger corporate brother".[38] Thus, the Peoples evidence did not overcome the parties' position that they intended the area rate clause to authorize the NGPA prices.

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[37] 43 FERC at p. 65,168.

[38] *Id.* Northern's General Counsel, Mr. Wallace, noted Peoples' position in the May 26, 1981 Monthly Report. However, that letter stated that Northern's position, was that:

> Northern always has contended that the "area rate" clauses *do* trigger the payment by Northern of higher prices. All of Northern's actions as well as all of the pleadings filed on behalf of Northern in this proceeding have been consistent with this position. (Emphasis in original). (Exhibit P-R-5).

We find no error in the judge's reasoning and conclusions, particularly under the *Hunt* standard. In this case Northern never expressed a contrary intent. The only indication of a different intent emanated from Peoples, an affiliated company. Further, there is no evidence that Producers acquiesced in Peoples' position since legal proceedings were commenced between Peoples and their intrastate suppliers. These suits resulted in Peoples agreeing to pay the NGPA prices. Clearly, if in *Hunt* the court held that United's unilateral initial refusal to pay could not be conclusive as to the producer's intent, it follows that an affiliate's unilateral position could not determine the parties' intent. Moreover, since Peoples later agreed to pay the NGPA prices, this would negate any meaning that might be implied from the initial refusal to pay the NGPA prices.

The Commission orders:

The initial decision is affirmed and the protests are dismissed.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Docket No. GP80-43-005 (Phase I)

Order Reversing Initial Decision and Remanding to Administrative Law Judge

(Issued December 12, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabrandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued August 10, 1984, appears at 28 FERC ¶ 63,028.]

Northern Natural Gas Company (Northern), an interstate pipeline which is now a division of InterNorth, Inc. (InterNorth), filed its evidentiary submission in the above-captioned Order No. 23 proceeding claiming that the area rate clause in its contracts with various producers entitled them to receive the higher prices permitted under the Natural Gas Policy Act of 1978 (NGPA). [1] In response, various third parties filed protests contending there was no such contractual authorization. The issue presented is whether protestors [2] have submitted sufficient evidence to prevent summary dismissal.

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[1] 15 U.S.C. §§ 3301-3432 (1984).

[2] Protestors are Commission Staff, Associated Gas Distributors (AGD) and the Minnesota Public Service Commission and the South Dakota Public Utilities Commission (PSCs).

Under the Commission's Order No. 23 rulemakings and subsequent cases clarifying that order's standards, [3] where the parties to the contract agree that the area rate clause was intended to authorize the collection of rates under the NGPA there is a presumption in favor of the contracting parties' interpretation. In order for third party protestors to obtain a hearing, and to avoid summary dismissal (absent contract language which a reasonable man would find precluded statutory rates), [4] they "must produce reliable and probative extrinsic evidence which negates the stated intent of the parties to the contract." [5] Resolution of the question of whether third parties have met this initial burden is significant, since at the hearing on the merits

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[3] See Order No. 23, Docket No. RM79-22 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040] (1979); Order on Rehearing of Order No. 23, 7 FERC ¶ 61,152 (1979); Order No. 23-A [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,058] (1979); Order on Rehearing of Order No. 23-A, 8 FERC ¶ 61,158 (1979); Order No. 23-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065] (1979); Order on Rehearing of Order No. 23-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,073] (1979). The cases include, among others, Opinion No. 77, 10 FERC ¶ 61,214 (1980); Opinion No. 135, 17 FERC ¶ 61,232 (1981) (*Transco I*); Opinion No. 181, 24 FERC ¶ 61,083 (1983) (*United Gas*); Opinion No. 215, 27 FERC ¶ 61,180 (1984) (*Transco II*); and Opinion No. 181-A, 27 FERC ¶ 61,199 (1984).

[4] In this case, the language would not preclude the statutory rates.

[5] *United Gas, supra*, 24 FERC at p. 61,219.

the burden of proof is on the parties to the contract to establish their intent, as the presumption no longer governs. [6]

In March 1981, third parties supplemented their protests with statements by Peoples Natural Gas Company (Peoples) denying that its area rate clause authorized NGPA rates. Peoples is a division of InterNorth and has always conducted local gas distribution for the corporation. [7] Protestors contended that Peoples' statements constituted reliable and probative extrinsic evidence contradicting Northern's interpretation that its area rate clause was intended to authorize NGPA rates. The most significant Peoples' statement is found in an Answer which Peoples filed in September 1980 as a defendant in a Federal court suit filed by a producer, McCoy Petroleum Company (McCoy). McCoy claimed that it was entitled to receive from Peoples the higher NGPA prices under its 1973 intrastate contract with Peoples, since that contract contained an area rate clause. That clause was identical to the one that Northern relies upon in this

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[6] *See Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 370 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982).

[7] Until May 1952, Peoples was a wholly-owned subsidiary of Northern, when it became an operating division. From May 1952 until a change in corporate name in March 1980, "Northern conducted its interstate pipeline operations through its Wholesale Operating Division and its retail distribution operations through its intrastate Operating Division, Peoples." (Exhibit 96, McCarthy testimony at 1. References to exhibits are those listed in Appendix A to the initial decision.) After the corporate name change, interstate pipeline operations were conducted through Northern Natural Gas Company, Division of InterNorth. Peoples, as a division of InterNorth, conducted local distribution.

case in claiming contractual authorization for the NGPA prices. In its Answer, Peoples stated that it "specifically denies that the enactment of the Natural Gas Policy Act of 1978 in any way triggered the quoted contract provision, nor is plaintiff in any way entitled to higher prices by reason of the enactment of the Natural Gas Policy Act of 1978 except to the extent those higher prices are cost based." [8] Peoples also averred in its Answer that the area rate clause "is clear and unambiguous and must be interpreted consistent with the clear intention of the parties, that is that price escalation thereunder is clearly limited to response to administratively established cost based rates, and consistent with the Kansas Natural Gas Protection Act and not otherwise." [9] Protestors also rely upon other statements by Peoples similarly disavowing that the area rate clause authorized collection of NGPA rates.[10]

The presiding judge rejected protestors' assertion that they had satisfied their initial burden to prevent summary dismissal, and instead ordered a hearing on the threshold issue of whether statements of Peoples could be attributed to Northern

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[8] Exhibit 81, ¶ 10.

[9] *Id.*, ¶ 12.

[10] *See, e.g.*, letter of May 3, 1979, Ex. 47. Protestors also rely upon a 1983 affidavit from a McCoy partner who had negotiated the McCoy gas contract with Peoples in 1973. He stated that the Peoples negotiator represented that the area rate clause in Peoples' intrastate contract was similar to the one in Northern's interstate contracts, and that it would entitle McCoy to receive "the same price as being received by producers making sales to pipelines which were engaged in interstate commerce." Exhibit 82.

in ascertaining Northern's intent. He allowed Northern to submit evidence on the operations of Northern and Peoples. Based upon all the evidence introduced he found that the "gas purchasing policies of neither division controlled those of the other," and that there was "no evidence that the expression of Peoples was considered, known, or adopted by Northern at the time it entered into the disputed clauses, and subsequent thereto, either prior to or after passage of NGPA." [11] He concluded that, for purposes of an Order 23 proceeding the Peoples evidence was not reliable and probative evidence sufficient to contradict Northern's stated interpretation.

The initial decision also held that, even assuming Peoples' statements could be attributable to Northern, the evidence submitted by protestors still would not be reliable and probative extrinsic evidence. Two different contracts are involved and the circumstances of the two are not the same. Thus, different interpretations could be given to the identical area rate clause. Accordingly, the presiding judge dismissed the protests, holding that the protestors had not met their initial burden.

Protestors filed exceptions urging that both the procedure followed and the conclusion reached by the presiding judge were erroneous. We agree with protestors that the presiding judge erred in holding that the protestors had not met their initial burden. Because the material upon which protestors rely did not emanate directly from Northern, the presiding judge stated that there was a threshold issue of whether Peoples' intent concerning the meaning of the area rate clause in its contract would automatically be ascribed to Northern. We believe that if the judge

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[11] *Northern Natural Gas Co.*, 28 FERC ¶ 63,028, at p. 65,087 (1984).

required a hearing to determine that issue, then *ipso facto* protestors had met their initial burden.

In *Transco I* we pointed out, as did the court in *Pennzoil*, [12] that for protestors to obtain a hearing on the merits, the evidence they submit need not be such that, if true, it would dispose of the case. It must merely be sufficient to rebut the presumption, since "[i]t was never the Commission's intention to present an insurmountable barrier to third party protestors" in Order 23 proceedings. [13] The submission by protestors in the instant matter of evidence that Northern and its local distribution company counterpart within InterNorth (Peoples) have different interpretations of identical area rate clauses satisfies the initial burden placed upon protestors. Peoples' interpretation of the contract language can be attributed to Northern because of common control, and thus Northern's interpretation has been rebutted with reliable and probative extrinsic evidence.

The presiding judge's reliance upon *Transco II* in reaching the conclusion that Peoples' admissions could not be attributed to Northern is misplaced. In that case, we held that the statement by one corporation, that the area rate clause in its contract did not authorize collection of a specified NGPA rate, was not binding upon a 50 percent-owned subsidiary. At all relevant times at issue in this proceeding, Northern and Peoples have been part of the same corporate entity. [14]

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[12] *See* n.6, *supra*.

[13] 17 FERC at p. 61,450

[14] In fact, some of the evidence submitted by protestors includes statements by Peoples prior to March 1980, when Peoples was a division of Northern.

We also disagree with the presiding judge's finding that Peoples' statements were not reliable and probative evidence, even assuming that Northern and Peoples are one entity, because the evidence related to a different contract, with differing circumstances. The possibility that identical contract language could express different contractual intent is insufficient to deny protestors a hearing. Protestors earned a right to a hearing on the merits by submitting evidence of admissions from within the same corporate entity that identical contract language could not permit NGPA pricing. The intention of the parties in agreeing to this provision is precisely the issue set for hearing.

We find that Peoples' statements are reliable and probative extrinsic evidence. Accordingly, we reverse the initial decision and remand the matter for a hearing on the merits.

The Commission orders:

A. The order issued in this docket on August 6, 1984, is reversed.

B. The exceptions of Commission Staff, Associated Gas Distribution and Minnesota Public Service Commission and the South Dakota Public Utilities Commission are granted to the extent indicated.

C. This proceeding is remanded to the Administrative Law Judge to hold a hearing on the merits.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Natural Gas Act, 15 U.S.C. 717r.
Rehearings; court review of orders

(b) **Review of Commission order.** Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify

its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239, and 240 of the Judicial Code, as amended.

Natural Gas Policy Act, 15 U.S.C. § 3311 (Inflation adjustments; other price ceiling rules) (b) (Rules of general application)

> **(9) Effect on contract price.**--In the case of--
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> (A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or
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> (B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter,

such maximum lawful price, or such exemption from such a maximum lawful price, shall not supersede or nullify the effectiveness of the price established under such contract.

Natural Gas Policy Act, 15 U.S.C. § 3416
Judicial Review

* * *

(4) Judicial review.--Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the

Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

18 C.F.R. § 207.205
Contractual authorization to collect NGPA rates

(a) Existing interstate contracts. In the case of an existing contract for a first sale of natural gas to which the Natural Gas Act applies:

(1) Any contractual provision for a change in price in such contract which by its terms specifically permits collection of NGPA rates or of maximum lawful prices prescribed by legislation, constitutes contractual authorization to charge and collect the NGPA rates applicable to such first sale.

(2) A contractual provision described in § 154.93 (b-1)(relating to area rate clauses), or similar provision generally will be considered to constitute contractual authorization to charge and collect an NGPA rate to the extent the parties intended to authorize charging and collection of one or more NGPA rates under the contract.

* * *

(c) Modification of contracts. The NGPA does not prohibit the parties to a contract for the first sale of natural gas from amending or modifying such contract to permit the seller to charge and collect any applicable NGPA rate or an adjustment under Subpart K of Part 271 for production-related costs or State severance taxes . . . .

(d) Definition. For purposes of this section, "NGPA rate" means maximum lawful price prescribed by or under the NGPA (including any price collection of which is authorized by Part 273) of this chapter.